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No. 82-1253

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

HERMAN S. SOLEM, etc., et al.,

Petitioner,

v.

JOHN BARTLETT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT BARTLETT IN OPPOSITION

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QUESTION PRESENTED

Did the Act of May 29, 1908, 35 Stat. 460, implicitly terminate federal court jurisdiction over major offenses by Indians occurring within the portions of the Cheyenne River Sioux and Standing Rock Sioux Reservations that the Act opened to non-Indian settlement?

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SUPPLEMENTAL STATEMENT OF THE CASE

Respondent Bartlett (who was petitioner below) pleaded guilty to a State charge of attempted rape on May 2, 1979. He was sentenced to ten years in the State Pentitentiary at Sioux Falls; including pretrial detention, about four years have been served.

The events that led to criminal charges against Bartlett occurred at Eagle Butte, South Dakota. As the State explains, the particular tract of land where these events took place was owned in unrestricted fee simple by a non-Indian. Bartlett is a member of the Cheyenne River Sioux Tribe, as is the complaining witness in his case.

Eagle Butte is in the portion of the Cheyenne River Reservation that was opened to non-Indian settlement by the Act

of May 29, 1908, 35 Stat. 460. Eagle Butte is also the capital and seat of government of the Cheyenne River Sioux Tribe. The Bureau of Indian Affairs Agency for the Tribe is located at Eagle Butte. According to the 1980 Census, Eagle Butte's population is about 78.5% Indian,[1/] and it includes large amounts of Indian trust land and federal Indian agency land.

The Treaty with the Sioux, June 29, 1868, 15 Stat. 635, reserved to the Sioux Nation a large area including all of what is now western South Dakota. The Act of March 2, 1889, 26 Stat. 888, ratified an agreement with the Sioux ceding much of

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1/ See U.S. Census Bureau, 1980 Census Summary Tape File 1-A (South Dakota) and 1980 Final Census Enumerated Districts Map (South Dakota), Enumerated Districts Nos. A1812-14, 1822-27.

the territory reserved in 1868 but reserving six separate reservations including the Cheyenne River and Standing Rock Reservations. The Act of May 29, 1908, supra, opened the western parts of both reservations to settlement by non-Indians. The eastern portion of the Standing Rock Reservation was opened to settlement by the Act of February 14, 1913, 37 Stat. 675. See United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977). Unsold lands from both openings were temporarily reserved in 1934 and restored to tribal ownership by orders of the Secretary of the Interior between 1941 and 1967.

SUMMARY OF ARGUMENT

1. Resolution of the conflict between the court below and the Supreme Court of South Dakota is not necessary. The principal matter dependent on the

Reservation's status is jurisdiction over serious crimes by Indians. Because of federal supremacy, the federal court's resolution of the issue is being and will be followed in practice.

2. The Court of Appeals' decision is consistent with this Court's decision in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). The Cheyenne River Reservation differs from the Rosebud Reservation in subsequent treatment of the opened area by the Interior Department and Congress, and there are crucial differences between the statute at issue here and those involved in Rosebud.

ARGUMENT

I. DESPITE DISAGREEMENT BETWEEN THE FEDERAL AND STATE COURTS, REVIEW BY THIS COURT IS UNNECESSARY.

The State correctly points out that the in banc decision of the Court of

Appeals in this case follows two prior panel decisions of the same court, but during the same period, the Supreme Court of South Dakota twice reached a contrary conclusion. Pet. 6-8.[2/] Nevertheless, resolution of this conflict is not of such importance that review by this Court in necessary.

Almost all jurisdictional disputes at Cheyenne River have arisen from felony criminal prosecutions. This has been the issue in five of the six cases cited by the State and in all other reported

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2/ The State further claims that prior to these cases there was solely state jurisdiction in the opened area "for over sixty years." Pet. 11. This unsupported assertion is not correct. The record includes references to two successful federal prosecutions of Indians for larceny in the opened area in 1928 and 1933. Appendix 96 to Hoxie Report. See Bartlett's motion to supplement the record filed July 1, 1982. In the decades prior to the recent cases, few Indians had legal counsel, and there are very few reported cases from the period.

cases on jurisdiction over the Reservation. Because of federal supremacy and the availability of habeas corpus under 28 U.S.C. § 2254, the Eighth Circuit's construction of the 1908 Act provides a practical, governing rule. (The Attorney General of South Dakota candidly acknowledged as much during oral argument to the Court of Appeals in this case.) Because the Court of Appeals' decision was in banc, that court's rule is obviously a stable one.

In the last few years, the United States Attorney has followed the Eighth Circuit's rule and has asserted federal jurisdiction over major crimes by Indians. See, e.g., United States v. Fay, 668 F.2d 375 (8th Cir. 1981) (bowling alley at Eagle Butte); United States v. Mound, 477 F. Supp. 156 (D.S.D. 1979) (Indian housing project at Eagle Butte). In

fact, one of the state court decisions relied on by the State here, State v. Janis, 317 N.W.2d 133 (S.D. 1982), actually was a case prosecuted by federal authorities in federal court. The offense involved was vehicular homicide within the same part of the Cheyenne River Reservation as the instant case. Mr. Janis was prosecuted by the United States Attorney and pleaded guilty to involuntary manslaughter. United States v. Janis, No. CR 80-30039-01 (D.S.D.). He was sentenced to the federal penitentiary. The South Dakota Supreme Court later decided that in its view he ought to have been prosecuted by the State instead, but his actual prosecution was by federal authorities.

The State's petition does not dispute these facts but asserts that review by this Court "is important to

the general public." Pet. 11. In reality the Reservation's status is important mostly to the Indians. Non-Indians are subject to federal Indian or tribal jurisdiction only when they commit federal crimes against Indians, sell liquor to them, lease Indian property, or have "some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 (1981); Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978); United States v. Mazurie, 419 U.S. 544 (1975); Williams v. United States, 327 U.S. 711 (1946).

II. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT.

The State's petition claims that the Court of Appeals' decision conflicts with prior decisions of this Court,

essentially with Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), affirming 521 F.2d 87 (8th Cir. 1975). The State then reviews alleged similarities between the Rosebud case and this one. But the State omits to mention three significant differences between the two cases.

First, this Court noted in Rosebud that "neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this [opened] area" and that the area "is over 90% non-Indian, both in population and in land-use." 430 U.S. at 604-05. By way of contrast, the Cheyenne River Reservation has a different history. The opened area has an Indian majority, and it includes Eagle Butte, the tribal capital and Bureau of Indian Affairs agency head-

quarters for the Reservation. 3/

Most reported criminal charges against Cheyenne River Indians have arisen at Eagle Butte. The ruling sought by the State would impose a very impractical, "checkerboard" jurisdiction on the tribal capital, a point illustrated by the precise tract definition included in the State's petition. Pet. 3. This Court condemned a like proposal in Seymour v. Superintendent, 368 U.S. 351 (1962).

Second, the Rosebud Indians agreed to "cede, surrender, grant and convey to the United States all their claim, right, title, and interest" in part of their reservation. 430 U.S. at 591 n.8. This Court said this action and language were "precisely suited" to

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3/ The Treaty of June 29, 1868, supra, at art. 5, provides that BIA agents to the Sioux "shall reside among them."

"disestablishment" of the affected area. 430 U.S. at 592, quoting DeCoteau v. District County Court, 420 U.S. 425, 445 (1975). By contrast, the Cheyenne River Sioux made no such agreement, nor does such language appear in the Act of May 29, 1908.

Third, this Court in Rosebud relied on the Presidential Proclamation opening that reservation to settlement:

> . . . the said Indian tribe ceded, conveyed, transferred, relinquished, and surrendered, forever and absolutely, without any reservation whatsoever, expressed or implied . . . all their claim, title, and interest of every kind and character. . .

430 U.S. at 602 (emphasis by the Court). By contrast the Cheyenne River opening proclamation contained no such language and merely opened to settlement and entry "all the nonmineral, unalloted, unreserved lands within the Cheyenne River and Standing Rock Indian Reser-

vations. . ." Proclamation of Aug. 19, 1909, 36 Stat. 2500. The Secretary of the Interior implemented the proclamation by an order that referred to opening "the classified lands within" the two reservations. 38 Interior Dec. 160 (1909).

There are other differences as well. The State relies on the fact that the Rosebud statutes and the Act of May 29, 1908, both granted school lands to the State. But this Court in Rosebud relied not on the grant itself but on legislative history construing it. 430 U.S. at 600-01. The legislative history of the school lands grant in the Act of May 29, 1908, shows a different understanding that does not support the State's argument. See 42 Cong. Rec. 7005 (1908) (remarks of Rep. Hall of S. Dak.). School

lands without more do not indicate disestablishment. See United States v. Thomas, 151 U.S. 577 (1894) (alternative holding).

The State relies on the phrase "reservations thus diminished" in a proviso to section 2 of the 1908 Act. Pet. 18. The Court of Appeals held that this language is "subject to two competing constructions", one referring to boundaries as the State contends, the other referring to diminished tribal land holdings within unchanged boundaries. Condon v. Erickson, 478 F.2d 684, 687 (8th Cir. 1973). The court concluded that the State had not shown that its meaning was intended. The history of the 1908 Act in fact shows that the phrase referred only to reduced land holdings.

The 1908 Act's essential purpose was, of course, to acquire land from the tribes for sale to homesteaders, so the natural meaning of the phrase in context was a reference to reduced tribal ownership. Also, the 1908 Act reserved from opening and sale mineral lands in the opened area (see the Presidential Proclamation quoted above), and lands for "agency, school and religious purposes." 1908 Act §§ 1, 2, 35 Stat. at 461-62. Furthermore, a number of official references to the Reservation after 1908 made statements such as:

> The opening of the reservation has increased the need rather than diminished the necessity for Indian police in both open and diminished parts of the reservation. 4/

4/ Appendix C to brief of four counties as amici curiae, doc. no. 12 at sec. I, p. 1 (1911 Annual Report of the Cheyenne River Superintendent). See also id. doc. no. 30 at p. 12 (1914 Annual Report of the Superintendent).

The State also relies on a 1910 amendment to the 1908 Act, imposing federal Indian liquor laws for 25 years. Pet. 20. But the State incorrectly describes this provision as applicable only to the area opened under the 1908 Act. Rather, the 1910 amendment applied to all parts of the reservations, including lands "retained or reserved." Act of Feb. 17, 1910, 36 Stat. 196.

The State also draws the wrong inference about this statute's purpose. Controlling decisions of this Court from the same era held that unrestricted lands within Indian reservations were not subject to the existing federal Indian liquor prohibition laws. For example, in Clairmont v. United States, 225 U.S. 551 (1912), the Court voided a liquor violation conviction that had

occurred on unrestricted lands within the Flathead Reservation in Montana.[5/] The legislative history of the 1910 Amendment to the Cheyenne River statute shows an intent to make an exception to this judicial rule. H.R. Doc. No. 711, 61st Cong., 2d Sess. (1910).

Other subsequent statutes show a congressional understanding that these reservations continued to include the area opened in 1908. The Act of February 14, 1913, 37 Stat. 675, opened the eastern part of the Standing Rock Reservation. The Act provided for opening "all that portion of the Standing Rock Indian Reservation . . . within the following

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5/ That reservation has been held to be intact despite an "opening" law very similar in its terms to the Act of May 29, 1908. See Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied, 103 S.Ct. 314.

described boundaries, to wit . . . "
(emphasis added). There follows a
metes and bounds description of the
opened area comprising all of that
reservation not opened by the 1908 Act.
Plainly, the 1913 Congress understood
that the 1908 opened area was still
part of Standing Rock, else the 1913
Act would have simply opened all of
the reservation. Another reference
to the 1908 opened area as "within"
the Cheyenne River and Standing Rock
Reservations occurs in the Act of
Sept. 3, 1954, 68 Stat. 1191, Sec. I
and 68 Stat. at 1209-16.

CONCLUSION

For the reasons stated, the writ should be denied.

Respectfully submitted,

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